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No. 01-456

In the Supreme Court of the United States

HOLLAND AMERICA LINE-WESTOURS, INC.,
PETITIONER

v.

NATIONAL PARKS AND CONSERVATION ASSOCIATION,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The court of appeals ruled that the National Park Service violated the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, by failing to prepare an environmental impact statement concerning its decision to increase the number of vessels permitted to enter Glacier Bay National Park and Preserve. The question presented is whether the court of appeals' instruction that the district court enter an injunction requiring the Park Service to rescind the increase in vessel entries pending the completion of an environmental impact statement is inconsistent with this Court's rulings in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), and *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531 (1987), or otherwise unlawful.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Amoco Prod. Co. v. *Village of Gambell*, 480 U.S. 531 (1987)	9, 11, 12, 13, 14, 15
Andrus v. *Sierra Club*, 442 U.S. 347 (1979)	3
Baltimore Gas & Elec. Co. v. *NRDC*, 462 U.S. 87 (1983)	3, 14
Charter Township of Huron v. *Richards*, 997 F.2d 1168 (6th Cir. 1993)	14
Citizens Against Burlington, Inc. v. *Busey*, 938 F.2d 190 (D.C. Cir. 1991)	14
City of Auburn v. *United States*, 154 F.3d 1025 (9th Cir. 1998)	4
Forest Conservation Council v. *United States Forest Serv.*, 66 F.3d 1489 (9th Cir. 1995)	15, 16
Greenpeace Action v. *Franklin*, 14 F.3d 1324 (9th Cir. 1993)	8, 9
Inland Empire Pub. Lands Council v. *United States Forest Service*, 88 F.3d 754 (9th Cir. 1996)	3
Kleppe v. *Sierra Club*, 427 U.S. 390 (1976)	4
New York v. *Nuclear Regulatory Comm'n*, 550 F.2d 745 (2d Cir. 1977)	17
Northern Cheyenne Tribe v. *Hodel*, 851 F.2d 1152 (9th Cir. 1988)	13
Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989)	3, 4
Sierra Club v. *Hodel*, 848 F.2d 1068 (10th Cir. 1988)	14

Cases—Continued: Page

Sierra Club v. *Marsh*, 872 F.2d 497 (1st Cir. 1989) 14, 17, 18
Stryckers Bay Neighborhood Council, Inc. v. *Karlen*, 444 U.S. 223 (1980) 4
Town of Huntington v. *Marsh*, 884 F.2d 648 (2d Cir. 1989) 14, 17
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 3
Village of Gambell v. *Hodel*, 774 F.2d 1414 (9th Cir. 1985), rev'd in part and vacated in part by *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531 (1987) 12
Weinberger v. *Romero-Barcelo*, 456 U.S. 305 (1982) 11, 12

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 7, 14
5 U.S.C. 705 14
5 U.S.C. 706(1) 14
5 U.S.C. 706(2) 14
Alaska National Interest Lands Conservation Act, 16 U.S.C. 3101 *et seq.* 12
Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, 115 Stat. 414 19
§ 130, 115 Stat. 442 ..... 2, 9, 20
Endangered Species Act, 16 U.S.C. 1531 *et seq.* 3
16 U.S.C. 1536 5
Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* 11
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 2
42 U.S.C. 4332(2)(C) 2, 3

Statutes and regulations:	Page
National Park Service Organic Act, 16 U.S.C. 1 *et seq.*	5
16 U.S.C. 1a-2(h)	5
16 U.S.C. 3	5
16 C.F.R. 13.65(b)	7
40 C.F.R.:	
Section 1500.1 *et seq.*	4
Section 1508.9(a)(1)	4
Section 1508.13	4
Section 1508.27(b)(4)	9
Miscellaneous:	
45 Fed. Reg. 32,228 (1980)	5
61 Fed. Reg. (1996):	
p. 27,008	7
p. 27,010	6
United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947)	14

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 241 F.3d 722. The order of the district court (Pet. App. 35a-70a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2001 (Pet. App. 32a-33a). A petition for rehearing was denied on May 18, 2001 (Pet. App. 34a). On August 8, 2001, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including September 15, 2001, and the petition was

filed on September 17, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 42 U.S.C. 4321 *et seq.*, directs federal agencies to prepare a detailed statement, known as an environmental impact statement (EIS), when undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). The National Parks and Conservation Association (NPCA), a nonprofit organization, challenged the decision of the Department of the Interior's National Park Service not to prepare an environmental impact statement when developing its Vessel Management Plan (VMP) for cruise ships and other vessels in Glacier Bay National Park and Preserve. The district court granted the federal respondents' motion for summary judgment and dismissed the case. Pet. App. 35a-72a. The court of appeals reversed that decision and directed the district court to enter an injunction enjoining the Park Service from increasing the number of vessel entries allowed, beyond the number allowed in 1996, pending the Park Service's completion of an EIS. Since the filing of the petition for a writ of certiorari, Congress has enacted legislation stating that "the number of vessel entries into the Park shall be the same as that in effect during the 2000 calendar year." See Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, § 130, 115 Stat. 442.

1. Glacier Bay National Park and Preserve, administered by the Department of the Interior's National Park Service, embraces 5000 square miles in southeastern Alaska, including 940 square miles of land and

more than 600 miles of shoreline. The Park "contains one of the world's largest protected marine areas," and its ecosystem is "unique * * * in the National Park System." C.A. Excerpts of Record (ER) 31, 82. It is "a major tourist destination where watercraft provide primary access to features of interest," and cruise ship passengers account for nearly 80 percent of Park visitors. ER 31, 104, 108. The Park is home to two species of marine mammals that are listed under the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.* They are the humpback whale, an endangered species, and the Steller sea lion, a threatened species. In addition, the Park provides habitat for other marine mammals and for 300 to 500 species of fish.

2. NEPA is a procedural statute intended to promote environmentally informed decision-making by federal agencies. See, *e.g.*, *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87 (1983); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978). Section 102(2)(C) requires federal agencies to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" a "detailed statement" (known as an environmental impact statement (EIS)) addressing, among other things, the environmental impact of and alternatives to the proposed action. 42 U.S.C. 4332(2)(C). NEPA injects environmental considerations into the federal agency's decision-making process and informs the public that the agency has considered environmental concerns in that process. See *Andrus* v. *Sierra Club*, 442 U.S. 347, 350-351 (1979); *Inland Empire Pub. Lands Council* v. *United States Forest Service*, 88 F.3d 754, 758 (9th Cir. 1996).

NEPA does not require agencies to "elevate environmental concerns over other appropriate considerations." *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980). Rather than mandating "particular results," the statute "simply prescribes the necessary process" to ensure that federal agencies will take a "hard look" at environmental consequences. *Methow Valley*, 490 U.S. at 350; see *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976). "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Methow Valley*, 490 U.S. at 350. "[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive.'" *Stryker's Bay*, 444 U.S. at 227.

An agency's compliance with NEPA is guided by regulations promulgated by the Council on Environmental Quality (CEQ). See 40 C.F.R. 1500.1 *et seq.* The regulations provide for the preparation of "environmental assessments" (EAs), which are "concise" documents that "briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact [(FONSI)]." 40 C.F.R. 1508.9(a)(1). An EIS is not required if the agency concludes in an EA and FONSI that the proposed action will not have a significant effect on the environment. *Ibid.*; 40 C.F.R. 1508.13. "[A]n agency may condition its decision not to prepare a full EIS on adoption of mitigation measures." *City of Auburn* v. *United States*, 154 F.3d 1025, 1033 (9th Cir. 1998).

3. In 1979, the National Marine Fisheries Service (NMFS) issued a biological opinion pursuant to Section 7 of the ESA, 16 U.S.C. 1536, concluding that uncontrolled increases in vessel traffic had likely altered the behavior of humpback whales within Glacier Bay National Park. ER 37-38, 152-153. Accordingly, in 1980, the Park Service promulgated regulations restricting vessel traffic in the Park. ER 146 (45 Fed. Reg. 32,228 (1980)). The 1980 regulations established a quota of 89 cruise ships in the Park during the summer whale season, with not more than two entries per day, and imposed various operating restrictions to minimize impacts on whales. ER 146.[1]

Later in the 1980s, after further study and renewed ESA consultation with NMFS, the Park Service increased the cruise ship quota to 107 entries. ER 31, 38-39, 146-147. In 1990, in response to demand for greater public access to the Park, the Park Service reviewed the vessel management regulations and commenced an environmental assessment under NEPA. See ER 31, 42-48. The agency considered various management options, including a proposal to increase the seasonal cruise ship quota by 74 percent to 184 entries annually and, at the same time, to adopt additional measures to protect natural resources in the Park. ER 67, 71-72, 77. The Park Service once again consulted with NMFS under the ESA. ER 157, 169, 175.

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[1] The regulations were promulgated pursuant to the National Park Service Organic Act, 16 U.S.C. 1 *et seq.*, which authorizes the Secretary of the Interior to adopt "such rules and regulations as he may deem necessary or proper for the use and management of the parks * * * under the jurisdiction" of the National Park Service, including "regulations concerning boating and other activities on or relating to waters located within areas of the National Park System." 16 U.S.C. 3, 1a-2(h).

After holding public hearings and reviewing public comments, the Park Service decided to increase cruise ship quotas by 30 percent over existing levels for the 1996 and 1997 seasons, with the potential for a further increase of up to the previously proposed 184 seasonal entries no earlier than 1998 and "contingent upon the completion of studies demonstrating that a further increase in cruise ship traffic would be consistent with protection of the values and purposes" of the Park. ER 250. Entry quotas for charter boats were increased by eight percent, and entries for private vessels were increased by fifteen percent. ER 247. Daily limits for all types of vessels remained unchanged. *Ibid.* The final Vessel Management Plan (VMP) included a variety of new measures to mitigate adverse environmental impacts, including closures of specific areas of the Park to vessels, expanding the "whale waters" in which stringent controls on vessel operations are imposed, and specific measures to protect particular species and prevent pollution. ER 253. See 61 Fed. Reg. 27,010 (1996).

The Park Service acknowledged that the impacts of the new VMP on whale distribution and certain other environmental effects could not be known with certainty. While some "short term displacement * * * may occur at increased levels" as a result of the VMP, predictions about overall whale use of the Park were "highly speculative." ER 260. The Park Service noted that "[p]redictions about humpback whale use of Glacier Bay and the contribution of this group of whales to total humpback whale numbers in Southeast Alaska are highly speculative due to the degree of uncertainty associated with factors such as prey availability." ER 119. As a result, the agency noted that "[f]ollow-up research and monitoring" would be "essential," and it

accordingly adopted an extensive program calling for such research. ER 260. The Park Service also noted that the mitigation measures "would reduce the risk of whale/vessel interactions and the level of potential effects on individual whales." *Ibid.*

The Park Service acknowledged that possible adverse effects on other resources within Glacier Bay National Park were possible, but it noted that the magnitude of those effects was unknown. ER 119. The Park Service determined that its proposed increases to the vessel quotas, combined with the new mitigation measures, could be "implemented with no significant adverse effect to natural and cultural resources as documented by the environmental assessment." ER 248. After receiving further public comment, the Park Service issued its final regulations implementing the plan, see 61 Fed. Reg. at 27,008 (ER 280-288), which are codified at 16 C.F.R. 13.65(b).

4. Respondent NPCA filed this action in May 1997, alleging that the Park Service's environmental review of the new VMP violated NEPA and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See ER 292 (complaint). NPCA alleged that "because the new VMP 'will or may' have significant environmental effects, it is a major federal action significantly affecting the quality of the human environment that necessitates the preparation of an EIS." ER 305. Petitioner Holland American Line-Westours, a cruise ship company that conducts tours that include Glacier Bay National Park, intervened as a defendant.

On cross-motions for summary judgment, the district court granted judgment for the federal respondents. The court noted that the parties "agree[d]" that, "despite extensive study," the effects of the VMP on the Park, and particularly on its humpback whale and

other marine mammal populations, "cannot be conclusively established." ER 320. See also ER 325 (noting parties' agreement that "uncertainty exists in the record"). The court concluded, however, that, in the circumstances presented, the acknowledged uncertainty did not require the preparation of an EIS because the uncertainty stemmed from a "genuine lack of scientific consensus on the subject," not from a want of diligent examination by the agency. Pet. App. 55a (citing *Greenpeace Action* v. *Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1993)). The court observed that the Park Service had "thoroughly consider[ed] the existing knowledge base" concerning the impacts in question and had permissibly reached a finding of no significant impact. ER 335.

5. The court of appeals reversed. That court pointed to statements in the environmental analysis describing the effects of the proposed increase in vessel entries on Park resources as "unknown," Pet. App. 8a-10a, 16a, and concluded that the Park Service had impermissibly failed to gather information that, in the court's view, "may be obtainable and that * * * would be of substantial assistance in the evaluation of the environmental impact of the planned vessel increase." *Id.* at 17a. The court of appeals regarded the research initiatives set forth in the EA as an illegitimate decision to "increase the risk of harm to the environment and then perform its studies." *Ibid.* (citation omitted). The court stated that the Park Service's "lack of knowledge does not excuse the preparation of an EIS; rather it requires the Parks Service [*sic*] to do the necessary work to obtain it." *Id.* at 18a. The court of appeals concluded that the Park Service had not adequately explained why more complete information was not available. *Id.* at 19a. In a similar vein, the court stated

that "[n]o new scientific developments are required in order to obtain the requisite information," because "[t]he passage of cruise ships through Glacier Bay is not a new development." *Id.* at 23a.

For similar reasons, the court of appeals held that the mitigation measures adopted by the Park Service failed to support the Park Service's conclusion that the vessel quota increases would not significantly affect the environment. Pet. App. 22a (citing *Greenpeace Action*, 14 F.3d at 1332). The court found that there was a "paucity of analytic data" supporting the Park Service's conclusion, *id.* at 20a, and it observed that the agency had not definitively concluded that particular measures would eliminate potential adverse impacts, *id.* at 20a-22a.[2]

On the question of remedy, the court of appeals noted that, under *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531 (1987), and its own precedent, an injunction would not issue automatically upon the finding of a NEPA violation, but would require an equitable balancing of harms. Pet. App. 26a. The court nevertheless noted that, by its nature, "'[e]nvironmental injury * * * is often * * * irreparable.'" *Ibid.* (quoting *Village of Gambell*, 480 U.S. at 545). The court of appeals concluded that an injunction was warranted in this case because an EIS had been found to be necessary, and "allowing a potentially environmentally damaging project to proceed" prior to preparing an EIS would be contrary to the purpose of NEPA's EIS requirement.

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[2] The court of appeals concluded that "controversy" surrounding the impacts of the new VMP, see 40 C.F.R. 1508.27(b)(4), also supported the conclusion that an EIS was required. Pet. App. 23a-26a. The court pointed to the fact that the Park Service "received 450 comments on the VMP, approximately 85% of which opposed" the version ultimately adopted. *Id.* at 24a-25a.

Id. at 27a. In response to petitioner's argument that tourists who had booked cruises in the expectation of visiting Glacier Bay would be harmed, the court concluded that the company had been on notice of the possibility of an injunction in this lawsuit and that its objection "fails to tilt the balance of harms in its favor." *Id.* at 28a.

The court of appeals directed the district court, on remand, "to enjoin the further increases in vessel traffic, and to return traffic levels to their pre-1996 levels." Pet. App. 29a. The court left in place other aspects of the VMP, including the expanded "whale waters" plan and other measures to protect the environment. *Ibid.* Noting that the injunction could affect previously booked tours, the court instructed the district court "to decide upon the effective date of the injunction * * *, and, specifically, to decide in its informed discretion, and on the basis of any evidence that may be presented, whether the injunction should take effect prior to the conclusion of this year's cruising season, sometime this September [2001]." *Id.* at 30a.

The federal respondents filed a petition for rehearing arguing that the panel's merits ruling was erroneous and that, in any event, the court should have remanded the case for the district court to determine based on evidence whether an injunction was warranted.[3] The

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[3] In particular, the federal respondents argued that (1) under Ninth Circuit precedent, the mere existence of uncertainty about environmental impacts did not preclude a FONSI where the agency had taken a hard look at the existing data; (2) the Park Service's mitigation measures were a reasonable response to the uncertainties in the record; (3) the existence of public comments opposing the new VMP did not alone render the environmental impacts "highly controversial" or mandate that an EIS be prepared; and (4) the court of appeals, rather than itself ordering an

panel denied that petition without comment. It also denied a petition for rehearing en banc filed by petitioners.

ARGUMENT

Petitioner asserts that the court of appeals' decision holding that an injunction is warranted in this case is inconsistent with the decisions of this Court and of other courts of appeals. That court's decision, however, has not produced a genuine conflict over the legal standards governing the exercise of equitable relief in NEPA cases. The court of appeals identified the proper legal test, and its application of that test turned on the court's assessment of particular facts in the administrative record. Although the court of appeals' decision was erroneous, this Court's review is not warranted, particularly in light of recent congressional action that, as a practical matter, has mooted the question of the appropriate interim remedy.

1. Petitioner's principal submission is that the court of appeals' decision is inconsistent with this Court's teachings in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), and *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531 (1987), that, in the absence of clear evidence that Congress intended to confine the courts' equitable discretion, an injunction does not issue automatically for a violation of an environmental statute, but instead depends upon a traditional balancing of the equities.

In *Romero-Barcelo*, a district court determined that the Navy had violated the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1251 *et seq.*, by dis-

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injunction, should have remanded the case to the district court to determine whether injunctive relief was appropriate.

charging ordnance into navigable waters without a permit. That court additionally found that the violation had not actually harmed water quality and accordingly declined to enjoin the Navy's activities while it sought the requisite permit. 456 U.S. at 309-310. The court of appeals, however, ordered the district court to issue an injunction. This Court reversed, holding that nothing in the FWPCA demonstrated congressional intent "to deny courts their traditional equitable discretion in enforcing the statute." *Id.* at 316. The court concluded that Congress, instead, had meant to "permit[] the district court to order that relief it considers necessary to secure prompt compliance with the Act." *Id.* at 320.

In *Village of Gambell*, the court of appeals had directed the district court to enter a preliminary injunction against oil exploration activities under oil leases issued by the Department of the Interior based on the agency's violation of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101 *et seq.*, which required the agency to consider the impact of its actions on subsistence resources. The court of appeals reasoned that "irreparable damage is *presumed* when an agency fails to evaluate thoroughly the environmental impact of a proposed action." 480 U.S. at 544-545 (quoting court of appeals' decision, 774 F.2d 1414, 1423 (9th Cir. 1985)) (emphasis added by this Court). Relying on *Romero-Barcelo*, this Court reversed, ruling that the Ninth Circuit's presumption of irreparable harm was "contrary to traditional equitable principles and has no basis in ANILCA." *Village of Gambell*, 480 U.S. at 545. The Court noted that the environment could be "fully protected" through the application of traditional equitable balancing and did not demand the presumption of irreparable harm adopted by the Ninth Circuit:

> Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

Ibid. The Court concluded that, in the circumstances presented, the equities weighed against an injunction in light of the absence of environmental harm and the high costs that an injunction would impose on the government's lessees. *Ibid.*

Petitioners assert that the court of appeals' decision conflicts with *Romero-Barcelo* and *Village of Gambell* because the court adopted a "presumption of irreparable harm" that "forecloses the full balancing of the equities which is required for issuance of an injunction." Pet. 19. However, the court of appeals expressly stated that its choice of remedy was to be guided by "traditional balance of harms analysis." Pet. App. 26a. See also *id.* at 27a n.18 ("We have fully weighed the competing interests using our traditional equitable jurisdiction, and conclude that injunctive relief is appropriate."). In that respect, there is no conflict between the legal standard elaborated by the court of appeals and this Court's decisions.

The court of appeals acknowledged that, like the environmental statutes at issue in *Romero-Barcelo* and *Village of Gambell*, NEPA does not displace the district courts' traditionally broad and flexible equitable powers. Pet. App. 26a; see *Northern Cheyenne Tribe* v. *Hodel*, 851 F.2d 1152, 1158 (9th Cir. 1988). That conclusion is correct: NEPA does not impose a specific remedial standard that would displace a court's equita-

ble powers; indeed, the statute nowhere addresses judicial enforcement.[4] Other circuits have likewise concluded that NEPA remedies are governed by traditional principles of equity. *E.g.*, *Charter Townhship of Huron* v. *Richards*, 997 F. 2d 1168, 1175 (6th Cir. 1993); *Citizens Against Burlington, Inc.* v. *Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991); *Town of Huntington* v. *Marsh*, 884 F.2d 648, 651 (2d Cir. 1989); *Sierra Club* v. *Marsh*, 872 F.2d 497, 502-504 (1st Cir. 1989); *Sierra Club* v. *Hodel*, 848 F.2d 1068, 1097 (10th Cir. 1988).

Petitioner nonetheless contends (Pet. 18-20) that the court of appeals proceeded to undermine any apparent adherence to traditional equitable balancing by apply-

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[4] Actions for judicial review of agencies' compliance with NEPA are governed by the review provisions of the APA, 5 U.S.C. 701 *et seq.* See *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 90 (1983). The APA directs the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed," and to "hold unlawful and set aside agency action, findings, and conclusions" found to be unsupported or contrary to law. 5 U.S.C. 706(1) and (2). Like NEPA itself, the APA does not require a court to issue an injunction for a violation and leaves intact courts' traditional power to devise equitable remedies for unlawful agency action. To the contrary, the APA's provision governing interim relief affirms traditional equitable standards on injunctions. See 5 U.S.C. 705 ("On such conditions as may be required and *to the extent necessary to prevent irreparable injury*, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.") (emphasis added); United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 106 (1947) ("irreparable injury, the historic condition of equity jurisdiction, is the indispensable condition to the exercise of the power conferred by [5 U.S.C. 705] upon reviewing courts").

ing a "presumption" of irreparable harm. Although we agree with petitioner that the court of appeals should have remanded the case to the district court for a hearing on the appropriate remedy, we do not believe the court applied a "presumption" of irreparable harm. Cf. *Village of Gambell*, 480 U.S. at 545. As evidence that the court applied such a presumption, petitioner emphasizes the court of appeals' statement, in a footnote, that withholding or limiting injunctive relief in a NEPA case is appropriate in "'unusual circumstances.'" Pet. App. 27a n.18 (quoting *Forest Conservation Council* v. *United States Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995)). Petitioner suggests that this phrase demonstrates that the court "foreclose[d] the full balancing of the equities." Pet. 19. The court of appeals' decision, however, does not support that contention.

The court stated that it "fully weighed the competing interests using our traditional equitable jurisdiction." Pet. App. 27a n.18. Moreover, the court's reference to "unusual circumstances" does not necessarily conflict with the equitable balancing adopted in *Romero-Barcelo* and *Village of Gambell*. There appears to be little substantial difference between the court of appeals' "unusual circumstances" formulation and this Court's observations in *Village of Gambell* that "[e]nvironmental injury * * * can seldom be adequately remedied by money damages" and that an equitable balancing of harms will "usually" favor an injunction when such an injury is "sufficiently likely." 480 U.S. at 545.

The court of appeals reviewed the administrative record and made a judgment based on the record that "there is a sufficient possibility of environmental harm" to warrant an injunction. Pet. App. 27a. The court

specifically concluded that a "significant adverse impact on the environment * * * might result from implementation of the VMP," *id.* at 26a; that the VMP was "potentially environmentally damaging," *id.* at 27a, and that "[k]ittiwakes, murrelet, eagles, sea otters, seals, sea lions, porpoises, and killer and minke whales, as well as the better known humpbacks, are affected," *ibid.* Thus, the court evidently was of the view that evidence of harm sufficient to support an injunction could be found in the administrative record itself.[5]

While we do not agree with the court's conclusion in that regard, the court's decision ultimately rested on a factual judgment about the magnitude of the environmental risks set forth in the administrative record. That judgment, although certainly subject to question, does not present a question warranting this Court's review. The court's decision should not be read to announce a legal standard under which irreparable harm to the environment is presumed from the mere fact of a NEPA violation.

2. Petitioner argues that the court of appeals' decision "irreconcilably conflicts" with decisions of other courts of appeals (and "even some Ninth Circuit precedent") because the court based its injunction on mere "speculative allegations of harm." Pet. 22-23. Petitioner, however, fails to demonstrate a clear conflict

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[5] Petitioner also reads too much into the court of appeals' discussion in *Forest Conservation Council* v. *United States Forest Service*, 66 F.3d 1489 (9th Cir. 1995). See Pet. 21. In that case, the court cited the discussion of Ninth Circuit NEPA law in *Village of Gambell* not as support for a presumption of irreparable harm, but instead as support for the proposition that interference with a "long-term contractual relationship" would be a factor weighing against a NEPA injunction, which the court noted could not issue "automatically." 66 F.3d at 1496.

among the courts of appeals over the types of harms sufficient to justify an injunction under NEPA.

Petitioner asserts that the court of appeals' decision conflicts with decisions of the Second Circuit, including *Town of Huntington* v. *Marsh*, 884 F.2d 648 (2d Cir. 1989), and *New York* v. *Nuclear Regulatory Comm'n*, 550 F. 2d 745 (2d Cir. 1977). But there is no demonstrable conflict warranting this Court's review. In *Town of Huntington*, the court of appeals vacated an injunction barring dumping of dredged materials because there was insufficient evidence of any danger to the environment, noting that "a threat of irreparable injury must be proved, not assumed." 884 F.2d at 653. In *New York*, the court of appeals affirmed the denial of a preliminary injunction against transport of nuclear materials where the record showed that the materials had been transported "without accident over a period of 25 years" and the likelihood of an accident was "infinitesimally small." 550 F.2d at 754.

The court of appeals in this case did not articulate any legal standard that conflicts with those decisions, and it did not espouse any rule of law that "speculative" harms may support a NEPA injunction. Rather, it determined that the alleged environmental risks posed by an increase in vessel traffic in Glacier Bay were sufficient to warrant an injunction. That factbound judgment does not warrant this Court's review.

Petitioner also suggests (Pet. 24-25) that the court of appeals misread the First Circuit's decision in *Sierra Club* v. *Marsh*, 872 F.2d 497 (1st Cir. 1989) (Breyer, J.). In *Sierra Club*, the court of appeals examined NEPA's procedural role in government decision-making and concluded that violation of NEPA procedures can cause "real environmental harm * * * through inadequate foresight and planning," a harm that may be considered

in the balancing of equities under *Village of Gambell*. *Id.* at 504. In particular, the court in *Sierra Club* referred to the danger that decision-makers may be unwilling to conduct a thorough examination of alternatives if they have already taken steps to implement a preferred policy. *Id.* at 503-504. The court noted that that type of harm is a "harm to the *environment*, not merely to a legalistic 'procedure.'" *Id.* at 504 (emphasis in original).

The court of appeals in this case cited *Sierra Club* in a footnote for the proposition that "because NEPA is a purely procedural statute, the requisite harm is the failure to follow the appropriate procedures." Pet. App. 27a n.18. The court added that the decision in *Sierra Club* also justifies injunctive relief in this case. *Ibid.* The court of appeals, however, did not fully describe the rationale of *Sierra Club*, which is based upon an increased risk of environmental harm (not purely procedural harm) resulting from a lack of informed decisionmaking. Furthermore, as petitioner observes (Pet. 25), it is doubtful whether the effect described in *Sierra Club* is a serious concern in the context of the Park Service's VMP, which is not a physical structure that involves significant sunk costs.

In any event, the court of appeals' brief mention of *Sierra Club* does not provide a basis for this Court's review. The court of appeals cited the *Sierra Club* only in passing as an "additional" basis for its decision, and, as noted, the court determined that the agency action here did pose a substantial risk of actual environmental harm warranting an injunction. The court did not hold that a violation of NEPA alone would justify an injunction.

3. Petitioner contends (Pet. 26-28) that the Court should grant certiorari to review the appropriate

procedures for determining whether injunctive relief is warranted in NEPA cases. Petitioner points out that the courts in the present case never allowed an opportunity for an evidentiary hearing on remedy and that both courts confined their review of evidence to materials from the administrative record, despite the existence of information concerning the VMP's impacts since its adoption.

We share petitioner's misgivings regarding the procedures that the court of appeals followed in this case. That court should have remanded the case to the district court and allowed it to evaluate the balance of hardships in light of the substantial amount of new information available since the VMP's adoption in 1996. Nevertheless, the court of appeals' particular remedial actions in this case do not present a matter warranting this Court's review. That conclusion is particularly true in light of legislative developments since the court of appeals' decision.

On November 5, 2001, President Bush signed the Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, 115 Stat. 414. Section 130 of the Act states:

> From within funds available to the National Park Service, such sums as may be necessary shall be used for expenses necessary to complete and issue, no later than January 1, 2004, an Environmental Impact Statement (EIS) to identify and analyze the possible effects of the 1996 increases in the number of vessel entries issued for Glacier Bay National Park and Preserve: Provided, That such EIS, upon its completion, shall be used by the Secretary to set the maximum level of vessel entries: *Provided further, That until the Secretary sets the level of*

> *vessel entries based on the new EIS, the number of vessel entries into the Park shall be the same as that in effect during the 2000 calendar year and the National Park Service approval of modified Alternative 5 and promulgation of the final rule issued on May 30, 1996, relating to vessel entries, including the number of such entries, for Glacier Bay National Park and Preserve are hereby approved and shall be in effect notwithstanding any other provision of law until the Secretary sets the maximum level of vessel entries consistent with this section*: Provided further, That nothing in this section shall preclude the Secretary from suspending or revoking any vessel entry if the Secretary determines that it is necessary to protect Park resources.

115 Stat. 442 (emphasis added). Section 130 has the practical effect of restoring the status quo respecting the permissible number of vessel entries by allowing the same number that the Park Service had allowed before the court of appeals' decision. As a consequence, there is no need for this Court to grant review to correct the court of appeals' mistaken actions in directing the district court to issue an injunction limiting the number of vessel entries into Glacier Bay pending completion of the EIS.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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